



PUBLIC NOTICE

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AUCTION OF FM TRANSLATOR CONSTRUCTION PERMITS SCHEDULED FOR JUNE 21, 2018

COMMENT SOUGHT ON COMPETITIVE BIDDING PROCEDURES FOR AUCTION 83

AU Docket No. 17-351

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TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
III. CONSTRUCTION PERMITS IN AUCTION 83.....	3
IV. REMEDIAL FILING WINDOW FOR SHORT-FORM APPLICATIONS (FCC FORM 175).....	5
V. BUREAUS SEEK COMMENT ON PROCEDURES FOR PENDING AUCTION APPLICATIONS	6
VI. UPDATES TO APPLICATION OUTSIDE OF FILING WINDOWS	12
VII. BUREAUS SEEK COMMENT ON BIDDING PROCEDURES	14
A. Auction Structure.....	15
1. Simultaneous Multiple-Round Auction Design	15
2. Bidding Rounds.....	16
3. Stopping Rule.....	19
4. Information Relating to Auction Delay, Suspension, or Cancellation	22
B. Auction Procedures.....	23
1. Upfront Payments and Bidding Eligibility.....	23
2. Activity Rule	25
3. Activity Rule Waivers and Reducing Eligibility.....	26
4. Reserve Price or Minimum Opening Bids.....	31
5. Bid Amounts	36
6. Provisionally Winning Bids	41
7. Bid Removal and Bid Withdrawal	44
C. Post-Auction Payments.....	48
1. Interim Withdrawal Payment Percentage.....	48
2. Additional Default Payment Percentage	50
VIII. TUTORIAL AND ADDITIONAL INFORMATION FOR AUCTION 83 APPLICANTS.....	53
IX. PROCEDURAL MATTERS	55
A. Deadlines and Filing Procedures	59

B. Contact Information	64
ATTACHMENT A: CONSTRUCTION PERMITS IN AUCTION 83	A-1

I. INTRODUCTION

1. By this Public Notice, the Wireless Telecommunications and Media Bureaus (Bureaus) announce an auction of certain FM translator construction permits and seek comment on the procedures to be used for this auction, designated as Auction 83. Bidding in this auction is scheduled to commence on June 21, 2018. Auction 83 will be a “closed” auction; only those entities listed in Attachment A to this Public Notice are eligible to complete the remaining steps to become qualified to bid in this auction.

II. BACKGROUND

2. Auction 83 will resolve groups of pending mutually exclusive (MX) applications for commercial FM translator construction permits. On February 6, 2003, the Bureaus announced an auction filing window for non-reserved band (Channels 221 to 300) applications for new FM translator stations and major modifications to authorized FM translator facilities.¹ By Public Notices released May 21, 2013 and April 30, 2014,² the Bureaus provided a list of all applications received during the filing window that were mutually exclusive with other applications submitted in the filing window.³ In the *Auction 83 Settlement Public Notices*, applicants in listed groups of mutually exclusive engineering proposals (MX groups) were given the opportunity to eliminate their mutual exclusivity with other applicants’ engineering proposals by settlement or technical modification to their proposals.⁴ The Bureaus will now proceed to auction with the 43 MX groups identified in Attachment A.

III. CONSTRUCTION PERMITS IN AUCTION 83

3. As discussed in greater detail below, Auction 83 will resolve mutually exclusive applications for construction permits for up to 43 new FM translator stations. A list of the locations and channels of these proposed stations is included in Attachment A.⁵ Attachment A also sets forth a proposed minimum opening bid and a proposed upfront payment amount for each construction permit.

¹ See *FM Translator Auction Filing Window and Application Freeze*, Public Notice, 18 FCC Rcd 1565 (MB/WTB 2003) (*Auction 83 Filing Window Public Notice*). The application filing deadline was subsequently extended to March 17, 2003. *FM Translator Auction Filing Window and Application Freeze Extended to March 17, 2003*, Public Notice, 18 FCC Rcd 3275 (MB/WTB 2003) (*Auction 83 Extension Public Notice*). Each applicant was required to file FCC Form 175, Application to Participate in an FCC Auction, and certain sections of FCC Form 349, Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station, which permitted staff to determine mutual exclusivities between applicant engineering proposals.

² See *FM Translator Auction 83 Mutually Exclusive Applicants Subject to Auction*, Public Notice, 28 FCC Rcd 9716 (MB 2013) (*Auction 83 First Settlement Public Notice*). *FM Translator Auction 83 Mutually Exclusive Applications Subject to Auction*, Public Notice, 29 FCC Rcd 4868 (MB/WTB 2014) (*Auction 83 Second Settlement Public Notice*).

³ In determining mutual exclusivity, the staff applied the following rule sections: 47 CFR §§ 73.37, 73.182, 73.183(b)(1), 73.3571. See *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2580-84, paras. 46-53 (2011) (codifying technical standards for determining mutual exclusivity among window-filed FM translator applications).

⁴ See *Auction 83 Second Settlement Public Notice*, 29 FCC Rcd at 4868; *Auction 83 First Settlement Public Notice*, 28 FCC Rcd at 9716. See also 47 CFR § 73.5002(d).

⁵ All applicants listed in Attachment A previously filed short-form applications (FCC Form 175) in the filing window announced in the *Auction 83 Filing Window Public Notice*. See *Auction 83 Filing Window Public Notice*, 18 FCC Rcd at 1565. The filing window was extended in the *Auction 83 Extension Public Notice*, 18 FCC Rcd at 3275.

4. An applicant listed in Attachment A may become qualified to bid only if it meets the additional filing, qualification, and payment requirements and otherwise complies with applicable requirements. Each applicant may become a qualified bidder only for those construction permits specified for that applicant in Attachment A to this Public Notice. Each of the engineering proposals within each MX group are directly mutually exclusive with one another; therefore, no more than one construction permit will be awarded for each MX group identified in Attachment A. Under the Commission's established precedent, because mutual exclusivity exists for auction purposes, once "mutually exclusive applications are accepted,"⁶ even if only one applicant for a particular construction permit becomes qualified to bid, that applicant must submit a bid in order to be eligible to obtain the construction permit.⁷ We seek comment on whether, in the event the Commission determines to apply to Auction 83 applicants the changes made since 2003 to Section 1.2105 of the auction rules described in paragraphs 9-11 below, we can or should apply a different approach in this unique context.

IV. REMEDIAL FILING WINDOW FOR SHORT-FORM APPLICATIONS (FCC FORM 175)

5. The Bureaus, in a future public notice, will specify procedures and announce a filing window for updating Auction 83 applicants' short-form auction applications (FCC Form 175).⁸ During this "remedial" filing window,⁹ each applicant seeking to become qualified to participate in the bidding must make any updates to information submitted in its short-form application that may be needed, whether to reflect new or revised information pursuant to section 1.65 of the Commission's rules, to comply with changes to the format of the FCC auction application system or to address other requirements of the Commission's competitive bidding rules, including amendments to those rules that may have been adopted subsequent to Auction 83 applicants' initial submissions.¹⁰ If a listed applicant

⁶ 47 U.S.C. § 309(j)(1).

⁷ See, e.g., *Auction of FM Broadcast Construction Permits Scheduled for July 23, 2015; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 98*, Public Notice, 30 FCC Rcd 3544, 3547 para. 5 (WTB/MB 2015)(*Auction 98 Procedures Public Notice*); *Auction of FM Broadcast Construction Permits Scheduled for July 23, 2015; Comment Sought on Competitive Bidding Procedures for Auction 98*, Public Notice, 30 FCC Rcd 1755, 1756 para. 2 & n.5 (WTB/MB 2015)(*Auction 98 Comment Public Notice*). See also Letter to J. Dominic Monahan, Esq., counsel to Rob Allen Hauser, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, re: Request for Refund of Upfront Payment for MX Group FM 130 in Closed Broadcast Auction No. 25, 16 FCC Rcd 2181 (WTB 2001); Letter to Carl Northrop, counsel to Vodafone Airtouch Licenses, LLC, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, re: Request for Refund for Licenses Purchased in Auction 26, 16 FCC Rcd 22358 (WTB 2001); *Closed Broadcast Auction; Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999; Minimum Opening Bids and Other Procedural Issues*, Public Notice, 14 FCC Rcd 10632, 10647 (WTB/MMB 1999).

⁸ Section VI of this Public Notice, below, describes how an applicant should report any updates required to be reported under 47 CFR §§ 1.65 and 1.2105 when an applicant is unable to electronically access the FCC auction application system.

⁹ We term this a "remedial" filing window because it will be the opportunity for each Auction 83 applicant to bring its previously-filed FCC Form 175 information into compliance with current system requirements, as well as to review, update and confirm information required to be disclosed pursuant to the Commission's competitive bidding rules. The applicants listed in attachment A submitted Auction 83 short-form applications through the Commission's since-retired auction application system. The Commission will process Auction 83 short-form applications using the current FCC auction application system.

¹⁰ 47 CFR § 1.65 (making applicants responsible for the continuing accuracy and completeness of information furnished in a pending application); 47 CFR Part 1, Subpart Q; see also *Updating Part 1 Competitive Bidding Rules; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Report and

(continued....)

fails to update its FCC Form 175 during the upcoming remedial filing window, it will be disqualified from further participation in Auction 83.

V. BUREAUS SEEK COMMENT ON PROCEDURES FOR PENDING AUCTION APPLICATIONS

6. Unlike most spectrum auctions, where auction applications are reviewed by Commission staff promptly after being submitted, the Auction 83 short-form applications have been pending for over 14 years and have not yet been reviewed for completeness and compliance with the Commission's competitive bidding rules.¹¹ Auction 83 applicants initially filed their short-form auction applications (FCC Form 175) and Form 349 tech box proposals in 2003. Since those applications were filed, the Bureaus have undertaken significant engineering analysis to determine mutual exclusivity among over 13,000 tech boxes that were initially filed.¹² In the intervening period, the Commission has also amended its Part 1 competitive bidding rules several times.¹³ In general, each Commission auction is subject to the current Commission's Part 1 competitive bidding rules, including any amendments that may be adopted after the initial filing of an application.¹⁴ In light of the many years during which the Auction 83 applicants' short-form applications have been pending, the Bureaus seek comment on whether certain aspects of the current rules governing auctions should be waived to account for regulatory and business changes that have occurred since these applications were filed in 2003.

7. *Prohibition on Major Changes.* We seek comment on whether to waive section 1.2105(b)'s prohibition on major changes with respect to transfers of control or assignments that have occurred to date and/or that have been subject to Commission review and approval by a particular date.¹⁵ Section 1.2105(b)(2) provides that an auction applicant that undertakes a major change, including a change of ownership that would constitute an assignment or transfer of control, after the short-form application deadline will be disqualified from participating in bidding.¹⁶ This rule applies uniformly to

(Continued from previous page)

Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, and Third Report and Order, 30 FCC Rcd 7493, 7577, para. 199 (2015) (*Updating Part 1 Report and Order*) (amending and modernizing Commission's Part 1 competitive bidding rules).

¹¹ See 47 CFR § 1.2105(b).

¹² See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15404 para. 4 (2012). Although applicants have not had electronic access to applications due to ongoing efforts to update the FCC's electronic auction application system, Auction 83 applicants have continued to have an option to submit updates to their applications outside of the auction application system, as discussed below. See Section VI, below.

¹³ See, e.g., *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Report and Order, 21 FCC Rcd 891 (2006) (amending competitive bidding rules to implement statutory directives and other changes); *Updating Part 1 Report and Order*, 30 FCC Rcd at 7493 (amending and modernizing Part 1 rules governing competitive bidding).

¹⁴ "It is well established by the courts that an applicant has no vested right to a continuation of the substantive standards in effect at the time its application was filed, whether or not the application has been accepted and achieved cut-off status." *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules*, Third Order on Reconsideration, 13 FCC Rcd 4856, 4941-42 para. 195 (1998) (holding that applicants have "no vested rights in the waiver applications that were pending at the Commission and that were dismissed in order to implement new [Local Multipoint Distribution Service] service rules," citing *Chadmore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997) and *Hispanic Information & Telecom. Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989)). See also 47 U.S.C. § 309(j)(6)(D) ("Nothing in [Section 309(j)], or in the use of competitive bidding, shall...be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection."); accord, *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585 (D.C. Cir. 2001).

¹⁵ 47 CFR § 1.2105(b)(2). The language of this rule section has remained unchanged since 2003.

¹⁶ *Id.*

auction applicants, including in broadcast auctions.¹⁷ As noted in the recent broadcast television spectrum incentive auction, this prohibition assures that “relevant parties are identified to the Commission prior to the auction” and that the representations and certifications in the application “remain effective and enforceable” while the application is pending.¹⁸ Further, preventing significant changes in the ownership of an applicant after the short-form application deadline assures that all applicants have consistent and transparent information about the identity of other applicants and, by leveling the informational playing field enhances competition in the auction. Accordingly, the bar on major modifications prevents an applicant entity from engaging in an assignment or transfer of control from the short-form deadline until after the auction closes. For Auction 83, this prohibition has already been in effect for more than 14 years, and will not be lifted before the passage of at least another six months.

8. Two Auction 83 applicants whose ultimate parent corporation had consummated a transfer of control pursuant to authorization granted by the Commission in 2008 have sought waiver of section 1.2105(b)(2)’s bar on major modifications.¹⁹ Absent a waiver, the rule would require the dismissal of those applicants’ short-form applications.²⁰ We seek comment on whether good cause exists to grant this request for waiver.²¹ Moreover, other Auction 83 applicants may have changed ownership or control since 2003 for operational or other business reasons entirely unrelated to the FM translator construction permits that they are seeking in Auction 83. Are there circumstances that would justify waiver of this rule for Auction 83 applicants? Should any such waiver be limited to certain transfers of control or assignments (e.g., that have occurred to date; that were subject to Commission review and approval by a particular date; and/or that were consummated pursuant to an assignment or transfer of

¹⁷ See, e.g., *Koch Broadcasting Corporation*, 21 FCC Rcd 147 (WTB/MB 2006) (denying request of Birach Broadcasting to amend Auction 84 short-form application filed by Koch Broadcasting Corporation following consummation of assignment of primary AM station from Koch to Birach, and dismissing Koch’s short-form application).

¹⁸ *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794, 10803 para. 24 (WTB 2015) (*Guidance Regarding the Prohibition of Certain Communications Public Notice*); see also *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5557 para. 59 (1994) (necessity of short-form application demonstrating compliance with rules); *Nexstar*, Memorandum Opinion and Order, 32 FCC Rcd 183, 207, para. 64 (MB/WTB)(granting waiver to permit transaction was dependent on assurances that the parties were identified to the Commission prior to the auction and that the representations in the application remained effective notwithstanding the transaction proceeding)

¹⁹ Certain indirect subsidiaries of Clear Channel Communications, Inc. have requested waiver of the provisions of section 1.2105(b)(2) of the Commission’s rules. See Letter to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, WTB, from Marissa G. Repp, Esq. (filed via auktion83@fcc.gov, dated Aug. 13, 2013) (seeking waiver of major change rule for transaction authorized in *Existing Shareholders of Clear Channel Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 1421 (2008)); see also Letter to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, WTB, from Lewis J. Paper, Esq. (filed by hand and via auktion83@fcc.gov, dated Oct. 17, 2013) (opposing request by indirect subsidiaries of Clear Channel Communication, Inc., for waiver of major change rule, on behalf of Monticello Media LLC); Letter to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, WTB, from Marissa G. Repp, Esq. (filed via auktion83@fcc.gov, dated Dec. 11, 2013) (moving to dismiss Monticello Media LLC’s request of Oct. 17, 2013, alleging lack of standing); Letter to Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, WTB, from Lewis J. Paper, Esq. (filed by hand and via auktion83@fcc.gov, dated Dec. 23, 2013) (opposing motion to dismiss).

²⁰ 47 CFR § 1.2105(b)(2).

²¹ 47 CFR §§ 1.3, 1.925. The waiver standard applied under section 1.3 and the waiver standard applied in the context of wireless radio services licenses, 47 CFR § 1.925, have been found to be substantially the same. See *Delta Radio, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16889, 16891 para. 7 & n.19 (2003) (citing *Bellsouth Corporation v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999)).

control involving all, or substantially all, of the assets of the applicant or its parent and which involve multiple licenses)?

9. *Prohibitions on Joint Bidding Agreements, on Separate Auction Applications By Commonly Controlled Entities, and on Certain Communications.* Under section 1.2105(a), as revised in 2015, each auction applicant must certify that it has disclosed any arrangements or understandings of any kind relating to the licenses being auctioned to which it (or any party that controls or is controlled by it) is a party, and must certify that it (or any party that controls or is controlled by it) has not entered and will not enter any arrangement or understanding of any kind relating directly or indirectly to bidding at auction with, among others, any other applicant for the auction.²² Consistent with this prohibition, the Commission also revised section 1.2105(a)(3) to prohibit the filing of more than one short-form auction application by any one entity or individual, or by multiple entities that have a controlling interest in common, and provided that if applications were filed by entities with overlapping controlling interests at most, only one of the applicants could become qualified to bid.²³ For purposes of this prohibition, the rule, section 1.2105(a)(4), defines “controlling interest” to include individuals or entities with *de jure* or *de facto* control.²⁴ In addition, the Commission also revised the rule prohibiting certain communications,

²² “The short-form application must contain...

(viii) Certification that the applicant has provided in its application a brief description of, and identified each party to, any partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls as defined in section 1.2105(a)(4) or is controlled by the applicant, is a party.

(ix) Certification that the applicant (or any party that controls as defined in section 1.2105(a)(4) or is controlled by the applicant) has not entered and will not enter into any partnerships, joint ventures, consortia or other agreements, arrangements, or understandings of any kind relating to the licenses being auctioned that address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure with: any other applicant (or any party that controls or is controlled by another applicant); with a nationwide provider that is not an applicant (or any party that controls or is controlled by such a nationwide provider); or, if the applicant is a nationwide provider, with any non-nationwide provider that is not an applicant (or with any party that controls or is controlled by such a non-nationwide provider), other than:

(a) Agreements, arrangements, or understandings of any kind that are solely operational as defined under section 1.2105(a)(4);

(b) Agreements, arrangements, or understandings of any kind to form consortia or joint ventures as defined under section 1.2105(a)(4);

(c) Agreements, arrangements or understandings of any kind with respect to the transfer or assignment of licenses, provided that such agreements, arrangements or understandings do not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid), or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure.”

47 CFR § 1.2105(a)(2)(viii-ix); *see also Updating Part 1 Order*, 30 FCC Rcd at 7570-78 paras. 180-201.

²³ 47 CFR § 1.2105(a)(3), (b)(1); *see also Updating Part 1 Order*, 30 FCC Rcd at 7580-81 paras. 206-08. The current rules contemplate that entities under common control would file a single auction application. *See Updating Part 1 Order*, 30 FCC Rcd at 7581 para. 208.

²⁴ 47 CFR § 1.2105(a)(4); *see also Updating Part 1 Order*, 30 FCC Rcd at 7580-81 para. 207.

section 1.2105(c), to prohibit communications of bids or bidding strategies between all applicants for an auction.²⁵

10. At the time Auction 83 applications were initially filed, section 1.2105 did not prohibit joint bidding agreements or the filing of separate auction application by entities with overlapping controlling interests. The rule required, as it does now, the disclosure of any such agreement and identification of all parties to it.²⁶ In addition, the section 1.2105(c) prohibition on certain communications applied only to communications of bids and bidding strategies between auction applicants for construction permits in any of the same geographic license, areas, with an exception for applicants that had identified each other on their short-form applications (FCC Form 175) as parties with whom they had entered into agreements pursuant to section 1.2105(a)(2)(viii).²⁷ In broadcast services, the “geographic license area” is the market designation of the particular service.²⁸ For purposes of this prohibition, both former section 1.2105(c)(7)(i) and current section 1.2105(c)(5)(i) define “applicant” as including all officers and directors of the entity submitting a short-form application to participate in the auction, all controlling interests of that entity, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application.²⁹ Further, in applying the prohibited communications rule, the Bureaus have found that, where an individual served as an officer and director for two or more applicants subject to the rule, the bids and bidding strategies of one applicant are presumptively conveyed to the other applicant.³⁰ Accordingly, the Bureaus determined under the former rule that, absent a disclosed bidding agreement between such applicants, an apparent violation of section 1.2105(c) would occur.³¹

11. We anticipate that some Auction 83 applicants and their pending applications may not be in compliance with the current provisions of section 1.2105. In light of the passage of time since the Auction 83 short-form application filing deadline in 2003, the rule revisions that have become effective, and the business changes that applicants any have undergone, we seek comment on whether waiver of

²⁵ See *Updating Part 1 Report and Order*, 30 FCC Rcd at 7577 para. 199; see also 47 CFR § 1.2105(a)(2)(ix), (c)(1).

²⁶ 47 CFR § 1.2105(a)(2)(viii).

²⁷ See 47 CFR §§ 1.2105(a)(2)(viii), 1.2105(c)(1) and 73.5002 (2003). The prohibitions of sections 1.2105(c) and 73.5002 against certain communications became effective for Auction 83 at the initial short-form application filing deadline on March 17, 2003, and will remain in effect until the down payment deadline after the auction closes, which will be announced in a future public notice. 47 CFR § 1.2105(c)(1). Each Auction 83 applicant certified in its initial FCC Form 175 application that it had not entered and will not enter into any explicit or implicit agreement, arrangement or understanding of any kind with any party, other than any identified in the application, regarding the applicant’s bids, bidding strategies, or the particular construction permit(s) on which it will or will not bid. 47 CFR § 1.2105(a)(2)(ix).

²⁸ See *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Seventh Report and Order, 16 FCC Rcd 17546, 17549 n.12 (2001)(*Part 1 Seventh Report and Order*).

²⁹ 47 CFR § 1.2105(c)(5)(i); 47 CFR § 1.2105(c)(7)(i)(2003).

³⁰ See, e.g., Letter to Colby M. May, TCCSA, Inc., d/b/a Trinity Broadcasting Network, from Barbara A. Kreisman, Chief, Video Division, Media Bureau, and Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, DA 05-2445, 20 FCC Rcd 14648 (WTB/MB 2005) (finding apparent violation of communication prohibitions of section 1.2105(c) where applicants with mutually exclusive applications reported sharing same individual as an officer and director and reported having no bidding agreement). Cf. *Guidance Regarding the Prohibition of Certain Communications Public Notice*, Public Notice, 30 FCC Rcd at 10800 para. 15 (An “individual possessing information regarding the bids and bidding strategies of more than one covered party could provide advice to another covered party that is influenced by the information he or she possesses, perhaps unintentionally, thereby resulting in a violation of the rule.”)

³¹ *Id.*

certain provisions of section 1.2105 to allow applicants to bring their applications into compliance with the current rules would serve the underlying purposes of these current prohibitions better than strict enforcement under these circumstances.³² If so, how might applicants bring themselves into compliance with current requirements during the upcoming remedial filing window? For example, if any Auction 83 applicants are under common control, should the Bureaus require such applicants to participate through a single bidding entity by filing a single application covering all of the MX engineering proposals applied for by the separate commonly controlled applicants? If so, should the Bureaus adopt specific procedures for the remedial filing window that would allow such Auction 83 applicants to come into compliance with current competitive bidding rules and requirements? Under this approach, we propose that any commonly controlled applicants that combine their applications for purposes of bidding would be able to apply separately post-auction for construction permits. As an alternative, if any Auction 83 applicants have overlapping controlling interests, should the Bureaus allow separate auction applications from Auction 83 applicants that are under common control? If so, how would we address the issue of prohibited communications of bidding-related information by shared officers or directors of Auction 83 applicants? To the extent any Auction 83 applicant may have previously entered into an arrangement that is now prohibited under section 1.2105's prohibition on joint bidding agreements, what steps could such parties take to bring themselves into compliance with current rules without implicating the concerns that led the Commission to adopt the new rule?³³ How should we address the potentially continuing effects of any previously negotiated arrangement relating to joint bidding that have been disclosed consistently with our prior rules? Irrespective of any waiver, should the Bureaus presume, absent affirmative evidence to the contrary, that any communications that may have occurred due to a shared director and officer during the more than ten years the initial applications have been pending prior to the remedial filing window did not involve bids or bidding strategies for purposes of applying the prohibition?³⁴ Commenters are encouraged to identify any particular circumstances of this auction that should guide us in developing application procedures under the competitive bidding rules now in effect, including the lengthy pendency of the auction applications, specific aspects of the auction application process and processing procedures, limitations on eligibility to bid on specific permits in this closed auction, the nature of the permits to be awarded, or any other relevant considerations.³⁵

VI. UPDATES TO APPLICATION OUTSIDE OF FILING WINDOWS

12. Section 1.65 of the Commission's rules requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission of any substantial change that may be of decisional significance to that application.³⁶ Thus, section 1.65 requires an auction applicant to notify the Commission of any substantial change to the information or certifications included in its pending short-form application.³⁷

13. If information needs to be submitted pursuant to sections 1.65 or 1.2105 outside of the initial, remedial, or resubmission windows in Auction 83, the applicant must submit a letter briefly

³² See 47 CFR § 1.925; see also 47 CFR § 1.3.

³³ See *Updating Part 1 Report and Order*, 30 FCC Rcd 7493, 7569-78, paras. 177-201; see also 47 CFR § 1.2105(a)(2)(ix), (c)(1).

³⁴ We do not cast doubt on the appropriateness of the presumption generally. We note the presumption that a director and officer with knowledge of multiple applicants' bids or bidding strategies is at least influenced by that knowledge when acting on behalf of any one applicant would remain appropriate with respect to applications filed in the remedial window, beginning at the deadline for filing. See *Guidance Regarding the Prohibition of Certain Communications Public Notice*, Public Notice, 30 FCC Rcd at 10800 para. 15.

³⁵ Commenters favoring waiver of any of these rules should focus in particular on whether the underlying purpose of the rule would be served by its application in this case. See 47 CFR §§ 1.3, 1.925.

³⁶ 47 CFR § 1.65; see also *Part 1 Seventh Report and Order*, 16 FCC Rcd at 17550-51 para. 9.

³⁷ See also 47 CFR § 1.2105(b)(4), (c).

summarizing the changes by email to auction83@fcc.gov.³⁸ Such email must include a subject or caption referring to Auction 83 and the name of the applicant.³⁹

VII. BUREAUS SEEK COMMENT ON BIDDING PROCEDURES

14. Consistent with the provisions of section 309(j)(3)(E)(i) of the Communications Act of 1934, as amended, and to ensure that potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction, the Commission directed the Bureaus, under delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of bidding in each auction.⁴⁰ The Bureaus therefore seek comment on multiple issues relating to the conduct of Auction 83.

A. Auction Structure

1. Simultaneous Multiple-Round Auction Design

15. The Bureaus propose to use the Commission's standard simultaneous multiple-round auction format for Auction 83.⁴¹ As described further below, this type of auction offers every construction permit for bid at the same time and consists of successive bidding rounds in which bidders may place bids on individual construction permits. Typically, bidding remains open on all construction permits until bidding stops on every construction permit. The Bureaus seek comment on this proposal.

2. Bidding Rounds

16. Under this proposal, Auction 83 will consist of sequential bidding rounds, each followed by the release of round results. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of bidding. Details on viewing round results, including the location and format of downloadable round results files, will be included in the same public notice.

³⁸ A party reporting any communication pursuant to sections 1.65, 1.2105(a)(2), or 1.2105(c)(6) must take care to ensure that any report of a prohibited communication does not itself give rise to a violation of section 1.2105(c). For example, a party's report of a prohibited communication could violate the rule by communicating prohibited information to other applicants through the use of Commission filing procedures that would allow such materials to be made available for public inspection. A party seeking to report such a prohibited communication is encouraged to coordinate with the Auctions and Spectrum Access Division staff about the procedures for submitting such reports.

³⁹ The Bureaus request that parties format any attachments to any such email as an Adobe® Acrobat® (pdf) or Microsoft® Word document.

⁴⁰ 47 U.S.C. § 309(j)(3)(E)(i). *See Amendment of Part I of the Commission's Rules—Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, 447-49, paras. 123-25 (1997) (*Part 1 Third Report and Order*) (directing WTB to seek comment on specific mechanisms related to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension or cancellation); *see also Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15967-68, paras. 127-28 (1998) (*Broadcast First Report and Order*) (consistent with the Part 1 rules, the Commission also delegated authority to the Media Bureau to seek comment and establish an appropriate auction design methodology prior to the start of each broadcast auction). *See generally* 47 CFR § 0.131(c); *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Proceeding*, Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making, 12 FCC Rcd 5686, 5697-98, para. 16 (1997) (*Part 1 Order*).

⁴¹ *See Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2360-75, paras. 68-159 (1994) (*Competitive Bidding Second Report and Order*) for a general discussion of competitive bidding design.

17. The Commission will conduct Auction 83 over the Internet using the FCC auction bidding system. Bidders will also have the option of placing bids by telephone through a dedicated auction bidder line. The toll-free telephone number for the auction bidder line will be provided to qualified bidders prior to the start of bidding in the auction.

18. The Bureaus propose to retain the discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. Under this proposal, the Bureaus may change the amount of time for the bidding rounds, the amount of time between rounds, or the number of rounds per day, depending upon bidding activity and other factors. The Bureaus seek comment on this proposal. Commenters on this issue should address the role of the bidding schedule in managing the pace of the auction, specifically discussing the tradeoffs in managing auction pace by bidding schedule changes, by changing the activity requirements or bid amount parameters, or by using other means.

3. Stopping Rule

19. The Bureaus have discretion to establish stopping rules before or during multiple round auctions in order to complete the auction within a reasonable time.⁴² For Auction 83, the Bureaus propose to employ a simultaneous stopping rule approach, which means all construction permits remain available for bidding until bidding stops on every construction permit. Specifically, bidding will close on all construction permits after the first round in which no bidder submits any new bids, applies a proactive waiver, or withdraws any provisionally winning bids (if bid withdrawals are permitted in this auction).⁴³ Thus, under the proposed simultaneous stopping rule bidding would remain open on all construction permits until bidding stops on every construction permit. Consequently, under this approach, it is not possible to determine in advance how long the bidding in this auction would last.

20. Further, the Bureaus propose to retain the discretion to exercise any of the following stopping options during Auction 83:

Option 1. The auction would close for all construction permits after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or places any new bid on a construction permit for which it is not the provisionally winning bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a construction permit for which it is the provisionally winning bidder would not keep the auction open under this modified stopping rule.

Option 2. The auction would close for all construction permits after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid (if withdrawals are permitted in this auction), or places any new bid on a construction permit that already has a provisionally winning bid. Thus, absent any other bidding activity, a bidder placing a new bid on an FCC-held construction permit (a construction permit that does not have a provisionally winning bid) would not keep the auction open under this modified stopping rule.

Option 3. The auction would close using a modified version of the simultaneous stopping rule that combines Option 1 and Option 2 above.

Option 4. The auction would close after a specified number of additional rounds (special stopping rule) to be announced by the Bureaus. If the Bureaus invoke this special stopping rule, they will accept bids in the specified final round(s), after which the auction will close.

⁴² 47 CFR § 1.2104(e).

⁴³ Provisionally winning bids are bids that would become final winning bids if the auction were to close in that given round. They are discussed in Section VII.B.6., "Provisionally Winning Bids." Proactive waivers are described in Section VII.B.3., "Activity Rule Waivers and Reducing Eligibility," and bid withdrawals are described in Section VII.B.7., "Bid Removal and Bid Withdrawal," below.

Option 5. The auction would remain open even if no bidder places any new bid, applies a waiver, or withdraws any provisionally winning bid (if withdrawals are permitted in this auction). In this event, the effect will be the same as if a bidder had applied a waiver. The activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a waiver.

21. The Bureaus propose to exercise these options only in certain circumstances, for example, where the auction is proceeding unusually slowly or quickly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time or will close prematurely. Before exercising these options, the Bureaus are likely to attempt to change the pace of the auction. For example, the Bureaus may adjust the pace of bidding by changing the number of bidding rounds per day and/or the minimum acceptable bids. The Bureaus propose to retain the discretion to exercise any of these options with or without prior announcement during the auction. The Bureaus seek comment on these proposals.

4. Information Relating to Auction Delay, Suspension, or Cancellation

22. For Auction 83, the Bureaus propose that the Bureaus may delay, suspend, or cancel bidding in the auction in the event of a natural disaster, technical obstacle, administrative or weather necessity, evidence of an auction security breach or unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding.⁴⁴ We will notify participants of any such delay, suspension or cancellation by public notice and/or through the FCC auction bidding system's announcement function. If the bidding is delayed or suspended we may, in our sole discretion, elect to resume the auction starting from the beginning of the current round or from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureaus to delay or suspend the auction. The Bureaus emphasize that we will exercise this authority solely at our discretion, and not as a substitute for situations in which bidders may wish to apply their activity rule waivers. The Bureaus seek comment on this proposal.

B. Auction Procedures

1. Upfront Payments and Bidding Eligibility

23. The Bureaus have delegated authority and discretion to determine an appropriate upfront payment for each construction permit being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of similar construction permits.⁴⁵ As described below, the upfront payment is a refundable deposit made by an applicant to establish eligibility to bid on construction permits. Upfront payments that are related to the specific construction permits being auctioned protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of bidding.⁴⁶ With these considerations in mind, the Bureaus propose the upfront payments set forth in Attachment A to this Public Notice. The Bureaus seek comment on the upfront payments specified in Attachment A.

24. The Bureaus further propose that the amount of the upfront payment submitted by a bidder will determine its initial bidding eligibility in bidding units. The Bureaus propose to assign each construction permit a specific number of bidding units, equal to one bidding unit per dollar of the upfront payment listed in Attachment A. The number of bidding units for a given construction permit is fixed and does not change during the auction as prices change. If an applicant is found to be qualified to bid on more than one permit being offered in Auction 83, such bidder may place bids on multiple construction permits, provided that the total number of bidding units associated with those construction permits does

⁴⁴ 47 CFR § 1.2104(i).

⁴⁵ See *Part 1 Order*, 12 FCC Rcd at 5697-98, para. 16. See also *Part 1 Third Report and Order*, 13 FCC Rcd at 425, para. 86; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-79, paras. 169-75.

⁴⁶ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-79, paras. 169-76.

not exceed its current eligibility. A bidder cannot increase its eligibility during the auction; it can only maintain its eligibility or decrease its eligibility. Thus, in calculating its upfront payment amount and hence its initial bidding eligibility, an applicant must determine the maximum number of bidding units on which it may wish to bid (or hold provisionally winning bids) in any single round, and submit an upfront payment amount covering that total number of bidding units. The Bureaus request comment on these proposals.

Example: Upfront Payments, Bidding Eligibility, and Bidding Flexibility			
Construction Permit	Market Name	Bidding Units	Upfront Payment
MM-FMT036	New Hampshire / Vermont	750	\$750
MM-FMT022	Florida 2 – Panama City	1,500	\$1,500

If a bidder wishes to bid on both of the above construction permits in a round, each construction permit must be designated for that bidder in Attachment A of this Public Notice, and that bidder must have purchased at least 2,250 bidding units (750 + 1,500) of bidding eligibility. If it only wishes to bid on one, but not both, purchasing 1,500 bidding units would meet the eligibility requirement for either construction permit. The bidder would be able to bid on either construction permit, but not both at the same time. If the bidder purchased only 750 bidding units, the bidder would have enough eligibility to bid for the New Hampshire / Vermont construction permit but not for the Panama City, Florida construction permit.

2. Activity Rule

25. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. The Bureaus propose a single stage auction with the following activity requirement: In each round of the auction, a bidder desiring to maintain its current bidding eligibility is required to be active on 100 percent of its bidding eligibility. A bidder's activity in a round will be the sum of the bidding units associated with any construction permits upon which it places bids during the current round and the bidding units associated with any construction permits for which it holds provisionally winning bids. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any, or a reduction in the bidder's eligibility, possibly curtailing or eliminating the bidder's ability to place additional bids in the auction.⁴⁷ The Bureaus seek comment on this proposal.

3. Activity Rule Waivers and Reducing Eligibility

26. For our proposed simultaneous multiple round auction format, we propose that when a bidder's activity in the current round is below the required minimum level, it may preserve its current level of eligibility through an activity rule waiver, if available. An activity rule waiver applies to an entire round of bidding, not to a particular construction permit. Activity rule waivers can be either proactive or automatic. Activity rule waivers are principally a mechanism for a bidder to avoid the loss of bidding eligibility in the event that exigent circumstances prevent it from bidding in a particular round.

27. The FCC auction bidding system will assume that a bidder that does not meet the activity requirement would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver at the end of any bidding round in which a bidder's activity level is below the minimum required unless (1) the bidder has no activity rule waivers remaining; or (2) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the activity requirement. If a bidder has no waivers remaining and does not satisfy the

⁴⁷ See Section VII.B.3., "Activity Rule Waivers and Reducing Eligibility," below.

required activity level, the bidder's current eligibility will be permanently reduced, possibly curtailing or eliminating the ability to place additional bids in the auction.

28. A bidder with insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding round by using the *reduce eligibility* function in the FCC auction bidding system. In this case, the bidder's eligibility would be permanently reduced to bring it into compliance with the activity rule described above. Reducing eligibility is an irreversible action; once eligibility has been reduced, a bidder cannot regain its lost bidding eligibility.

29. Under the proposed simultaneous stopping rule, a bidder would be permitted to apply an activity rule waiver proactively as a means to keep the auction open without placing a bid. If a bidder proactively were to apply an activity rule waiver (using the *proactive waiver* function in the FCC auction bidding system) during a bidding round in which no bids are placed or withdrawn (if bid withdrawals are permitted in this auction), the auction would remain open and the bidder's eligibility would be preserved. An automatic waiver applied by the FCC auction bidding system in a round in which there is no new bid, a withdrawal (if bid withdrawals are permitted in this auction), or a proactive waiver would not keep the auction open.

30. Consistent with recent FCC spectrum auctions, the Bureaus propose that each bidder in Auction 83 be provided with three activity rule waivers that may be used as set forth above at the bidder's discretion during the course of the auction. The Bureaus seek comment on this proposal.

4. Reserve Price or Minimum Opening Bids

31. Consistent with the statutory mandate of section 309(j),⁴⁸ the Commission has directed the Bureaus to seek comment on the use of a minimum opening bid amount and/or reserve price prior to the start of each auction.⁴⁹

32. Normally, a reserve price is an absolute minimum price below which a construction permit or license will not be sold in a given auction. A minimum opening bid, on the other hand, is the minimum bid price set at the beginning of the auction below which no bids are accepted. It is generally used to accelerate the competitive bidding process. It is possible for the minimum opening bid and the reserve price to be the same amount.

33. The Bureaus propose to establish minimum opening bid amounts for Auction 83. The Bureaus believe that a minimum opening bid amount, which has been used in other broadcast auctions, is an effective bidding tool for accelerating the competitive bidding process.⁵⁰ The Bureaus do not propose to establish separate reserve prices for the construction permits to be offered in Auction 83.

34. For Auction 83, the Bureaus propose minimum opening bid amounts determined by taking into account the type of service and class of facility offered, market size, population covered by the proposed broadcast facility, and recent broadcast transaction data. Attachment A to this Public Notice lists a proposed minimum opening bid amount for each construction permit available in Auction 83. The Bureaus seek comment on the minimum opening bid amounts specified in Attachment A.

35. If commenters believe that these minimum opening bid amounts will result in unsold construction permits, are not reasonable amounts, or should instead operate as reserve prices, they should explain why this is so and comment on the desirability of an alternative approach. The Bureaus ask commenters to support their claims with valuation analyses and suggested amounts or formulas for reserve prices or minimum opening bids. In establishing the minimum opening bid amounts, the Bureaus

⁴⁸ 47 U.S.C. § 309(j)(4)(F). See also 47 CFR § 1.2104(c), (d).

⁴⁹ *Broadcast First Report and Order*, 13 FCC Rcd at 15971, para. 134; *Part 1 Third Report and Order*, 13 FCC Rcd at 454-56, paras. 139-41. See also 47 CFR § 1.2104(c), (d).

⁵⁰ See, e.g., *Auction 98 Procedures Public Notice*, 30 FCC Rcd at 3579, para. 139.

particularly seek comment on factors that could reasonably have an impact on bidders' valuation of the broadcast spectrum, including the type of service offered, market size, population covered by the proposed broadcast facility and any other relevant factors.

5. Bid Amounts

36. The Bureaus propose that, in each round, an eligible bidder will be able to place a bid on a given construction permit in any of up to nine different amounts.⁵¹ Under this proposal, the FCC auction bidding system interface will list the acceptable bid amounts for each construction permit.

37. The first of the acceptable bid amount is called the minimum acceptable bid amount. The minimum acceptable bid amount for a construction permit will be equal to its minimum opening bid amount until there is a provisionally winning bid for the construction permit. After there is a provisionally winning bid for a construction permit, the minimum acceptable bid amount will be a certain percentage higher. The percentage used for this calculation, the *minimum acceptable bid increment percentage*, is multiplied by the provisionally winning bid amount, and the resulting amount is added to the provisionally winning bid amount. If, for example, the minimum acceptable bid increment percentage is 10 percent, then the provisionally winning bid amount is multiplied by 10 percent. The result of that calculation is added to the provisionally winning bid amount, and that sum is rounded using the Commission's standard rounding procedure for auctions.⁵² If bid withdrawals are permitted in this auction, in the case of a construction permit for which the provisionally winning bid has been withdrawn, the minimum acceptable bid amount will equal the second highest bid received for the construction permit.⁵³

38. Under this proposal, the FCC will calculate the eight additional bid amounts using the minimum acceptable bid amount and an *additional bid increment percentage*. The minimum acceptable bid amount is multiplied by the additional bid increment percentage, and that result (rounded⁵⁴) is the additional increment amount. The first additional acceptable bid amount equals the minimum acceptable bid amount plus the additional increment amount. The second additional acceptable bid amount equals the minimum acceptable bid amount plus two times the additional increment amount; the third additional acceptable bid amount is the minimum acceptable bid amount plus three times the additional increment amount; etc. If, for example, the additional bid increment percentage is 5 percent, then the calculation of the additional increment amount is (minimum acceptable bid amount) * (0.05), rounded. The first additional acceptable bid amount equals (minimum acceptable bid amount) + (additional increment amount); the second additional acceptable bid amount equals (minimum acceptable bid amount) + (2*(additional increment amount)); the third additional acceptable bid amount equals (minimum acceptable bid amount) + (3*(additional increment amount)); etc.

39. For Auction 83, the Bureaus propose to use a minimum acceptable bid increment percentage of 10 percent. This means that the minimum acceptable bid amount for a construction permit will be approximately 10 percent greater than the provisionally winning bid amount for the construction permit. To calculate the additional acceptable bid amounts, the Bureaus propose to use an additional bid increment percentage of 5 percent. The Bureaus seek comment on these proposals.

40. The Bureaus propose to retain the discretion to change the minimum acceptable bid amounts, the minimum acceptable bid increment percentage, the additional bid increment percentage, and the number of acceptable bid amounts if the Bureaus determine that circumstances so dictate, consistent

⁵¹ See 47 U.S.C. § 309(j)(4)(F); 47 CFR § 1.2104(d)(minimum bid increments, minimum opening bids and maximum bid increments). Bidders must have sufficient eligibility to place a bid on the particular construction permit. See Section VII.B.1., "Upfront Payments and Bidding Eligibility," above.

⁵² Results above \$10,000 are rounded to the nearest \$1,000; results below \$10,000 but above \$1,000 are rounded to the nearest \$100; and results below \$1,000 are rounded to the nearest \$10.

⁵³ See Section VII.B.7., "Bid Removal and Bid Withdrawal," below.

⁵⁴ See note 52 (concerning rounding), above.

with past practice.⁵⁵ Further, the Bureaus propose to retain the discretion to do so on a construction permit-by-construction permit basis. The Bureaus also propose to retain the discretion to limit (a) the amount by which a minimum acceptable bid for a construction permit may increase compared with the corresponding provisionally winning bid, and (b) the amount by which an additional bid amount may increase compared with the immediately preceding acceptable bid amount. For example, the Bureaus could set a \$1,000 limit on increases in minimum acceptable bid amounts over provisionally winning bids. Thus, if calculating a minimum acceptable bid using the minimum acceptable bid increment percentage results in a minimum acceptable bid amount that is \$1,200 higher than the provisionally winning bid on a construction permit, the minimum acceptable bid amount would instead be capped at \$1,000 above the provisionally winning bid. The Bureaus seek comment on the circumstances under which the Bureaus should employ such a limit, factors the Bureaus should consider when determining the dollar amount of the limit, and the tradeoffs in setting such a limit or changing other parameters, such as changing the minimum acceptable bid percentage, the bid increment percentage, or the number of acceptable bid amounts. If we exercise this discretion, we will alert bidders by announcement in the FCC auction bidding system during the auction. The Bureaus seek comment on these proposals.

6. Provisionally Winning Bids

41. The bidding system will determine provisionally winning bids consistent with practice in past auctions.⁵⁶ At the end of each bidding round, the bidding system will determine a *provisionally winning bid* for each construction permit based on the highest bid amount received for that permit. A provisionally winning bid will remain the provisionally winning bid until there is a higher bid on the same construction permit at the close of a subsequent round. Provisionally winning bids at the end of the auction become the winning bids.

42. If identical high bid amounts are submitted on a construction permit in any given round (i.e., tied bids), the FCC auction bidding system will use a pseudo-random number generator to select a single provisionally winning bid from among the tied bids. This means that the auction bidding system assigns a pseudo-random number to each bid when the bid is entered. The tied bid with the highest pseudo-random number wins the tiebreaker and becomes the provisionally winning bid. The remaining bidders, as well as the provisionally winning bidder, can submit higher bids in subsequent rounds. However, if the auction were to close with no other bids being placed, the winning bidder would be the one that placed the provisionally winning bid. If the construction permit receives any bids in a subsequent round, the provisionally winning bid again will be determined by the highest bid amount received for the construction permit.

43. A provisionally winning bid will be retained until there is a higher bid on the construction permit at the close of a subsequent round, unless the provisionally winning bid is withdrawn (if bid withdrawals are permitted in this auction). As a reminder, provisionally winning bids count toward activity for purposes of the activity rule.⁵⁷

7. Bid Removal and Bid Withdrawal

44. The FCC auction bidding system allows each bidder to remove any of the bids it placed in a round before the close of that round. By removing a bid placed within a round, a bidder effectively “unsubmits” the bid. In contrast to the bid withdrawal provisions described below, a bidder removing a bid placed in the same round would not be subject to a withdrawal payment. Once a round closes, a bidder is no longer permitted to remove a bid.

⁵⁵ See e.g., *Auction 98 Procedures Public Notice*, 30 FCC Rcd at 3588 paras. 147-8; see also 47 CFR § 1.2104(d) (“The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.”)

⁵⁶ See e.g., *Auction 98 Comment Public Notice*, 30 FCC Rcd at 1764-65 para. 37.

⁵⁷ See Section VII.B.2., “Activity Rule,” above.

45. The Bureaus seek comment on whether bid withdrawals should be permitted in Auction 83. When permitted in an auction, bid withdrawals provide a bidder with the option of withdrawing bids placed in prior rounds that have become provisionally winning bids. A bidder would be able to withdraw its provisionally winning bids using the *withdraw* function in the FCC auction bidding system. A bidder that withdraws its provisionally winning bid(s), if permitted, is subject to the bid withdrawal payment provisions of the Commission rules.⁵⁸

46. The Commission has recognized that bid withdrawals may be a helpful tool for bidders seeking to efficiently aggregate licenses or implement backup strategies in certain auctions.⁵⁹ The Commission has also acknowledged that allowing bid withdrawals may encourage insincere bidding or increase opportunities for anti-competitive bidding in certain circumstances.⁶⁰ The stand-alone nature of FM translator facilities, however, suggests that it is not necessary for bidders to aggregate facilities being offered in the same auction in order to realize full value from those facilities, or to put the spectrum to effective and efficient use.

47. Based on the nature of the permits being offered in Auction 83, and on our experience with past auctions of broadcast construction permits, the Bureaus propose to prohibit bidders from withdrawing any bid after the close of the round in which that bid was placed. The Bureaus make this proposal in light of the site- and applicant-specific nature and wide geographic dispersion of the permits available in this closed auction, which suggests that potential applicants for this auction will have limited opportunity to aggregate construction permits through the auction process (as compared with bidders in many auctions of wireless licenses) because of the closed MX groups previously established. Thus, the Bureaus believe that it is unlikely that bidders will have a need to withdraw bids in this auction. The Bureaus also remain mindful that bid withdrawals, particularly those made late in this auction, could result in delays in licensing new FM translator stations and attendant delays in the offering of new broadcast service to the public. The Bureaus seek comment on our proposal to prohibit bid withdrawals in Auction 83.

C. Post-Auction Payments

1. Interim Withdrawal Payment Percentage

48. In the event the Bureaus allow bid withdrawals in Auction 83, the Bureaus propose the interim bid withdrawal payment be 20 percent of the withdrawn bid. A bidder that withdraws a bid during an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or a subsequent auction.⁶¹ However, if a construction permit for which a bid has been withdrawn does not receive a subsequent higher bid or winning bid in the same auction, the FCC cannot calculate the final withdrawal payment until that construction permit receives a higher bid or winning bid in a subsequent auction. In such cases, when that final withdrawal payment cannot yet be calculated, the FCC imposes on the bidder responsible for the withdrawn bid an interim bid withdrawal payment, which will be applied toward any final bid withdrawal payment that is ultimately assessed.⁶²

49. The amount of the interim bid withdrawal payment is established in advance of bidding in each auction, and may range from three percent to 20 percent of the withdrawn bid amount.⁶³ The

⁵⁸ 47 CFR §§ 1.2104(g), 1.2109.

⁵⁹ See *Part 1 Third Report and Order*, 13 FCC Rcd at 458-60, paras. 148-50.

⁶⁰ See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Report and Order, 21 FCC Rcd 891, 902-03, para. 29, 904 n.57 (2006) (*CSEA/Part 1 Report and Order*).

⁶¹ 47 CFR § 1.2104(g)(1).

⁶² *Id.*

⁶³ *Id.*

Commission has determined that the level of interim withdrawal payment in a particular auction will be based on the nature of the service and the inventory of the licenses being offered.⁶⁴ The Commission has noted specifically that a higher interim withdrawal payment percentage is warranted to deter the anti-competitive use of withdrawals when, for example, bidders will not need to aggregate the licenses being offered in the auction or when there are few synergies to be captured by combining licenses. In light of these considerations with respect to the construction permits being offered in Auction 83, the Bureaus propose to use the maximum interim bid withdrawal payment percentage permitted by section 1.2104(g)(1) in the event bid withdrawals are allowed. The Bureaus request comment on using 20 percent for calculating an interim bid withdrawal payment amount in Auction 83. Commenters advocating the use of bid withdrawals should also address the percentage of the interim bid withdrawal payment.

2. Additional Default Payment Percentage

50. Any winning bidder that defaults or is disqualified after the close of an auction (i.e., fails to remit the required down payment by the specified deadline, fails to submit a timely long-form application, fails to make a full and timely final payment, or is otherwise disqualified) is liable for a default payment under section 1.2104(g)(2) of the rules.⁶⁵ This payment consists of a deficiency payment, equal to the difference between the amount of the Auction 83 bidder's winning bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter's bid or of the subsequent winning bid, whichever is less.

51. The Commission's rules provide that, in advance of each auction, it will establish a percentage between three percent and 20 percent of the applicable winning bid to be assessed as an additional default payment.⁶⁶ As the Commission has indicated, the level of this additional payment in each auction will be based on the nature of the service and the construction permits being offered.⁶⁷

52. For Auction 83, the Bureaus propose to establish an additional default payment of 20 percent. As noted in the *CSEA/Part 1 Report and Order*, defaults weaken the integrity of the auction process and may impede the deployment of service to the public, and an additional 20 percent default payment will be more effective in deterring defaults than the three percent used in some earlier auctions.⁶⁸ In light of these considerations, the Bureaus propose for Auction 83 an additional default payment of 20 percent of the relevant bid. Moreover, a 20 percent additional default payment amount is consistent with the percentage used in recent auctions of broadcast construction permits.⁶⁹ The Bureaus seek comment on this proposal.

VIII. TUTORIAL AND ADDITIONAL INFORMATION FOR AUCTION 83 APPLICANTS

53. The Bureaus intend to provide educational opportunities for applicants to familiarize themselves with the FCC auction application system and the auction bidding system. For example, the Bureaus intend to release an online tutorial that will help applicants understand the procedures to be followed in the filing window for updating their auction short-form applications (FCC Form 175).

54. Auction 83 will use the FCC's new auction bidding system, an extensive redesign of the previous auction bidding system. The redesign includes enhancements to the auction bidding system,

⁶⁴ See *CSEA/Part 1 Report and Order*, 21 FCC Rcd at 903-04, paras. 30-31.

⁶⁵ 47 CFR § 1.2104(g)(2).

⁶⁶ See *id.*

⁶⁷ See *CSEA/Part 1 Report and Order*, 21 FCC Rcd at 903-04, paras. 30-31.

⁶⁸ *Id.*, 21 FCC Rcd at 902-03, para. 29.

⁶⁹ See, e.g., *Auction 98 Procedures Public Notice*, 30 FCC Rcd at 3584, para. 168 (setting additional default payment for Auction 98 permits at 20 percent of the applicable bid).

such as easier navigation and customizable results. The Bureaus intend to provide additional information on these enhancements and to provide educational materials for applicants to familiarize themselves with the auction bidding system.

IX. PROCEDURAL MATTERS

55. The Regulatory Flexibility Act of 1980 (RFA) requires that an initial regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings,⁷⁰ unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁷¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁷³ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁷⁴

56. This Public Notice seeks comment on proposed procedures to govern Auction 83, an auction of up to 43 commercial FM translator construction permits, and on proposed procedures for processing pending Auction 83 applications. This process is intended to provide notice of and adequate time for potential applicants to comment on proposed auction and application procedures.⁷⁵ To promote the efficient and fair administration of the competitive bidding process for all Auction 83 participants, including small businesses, the Bureaus seek comment on the following proposed procedures:

- whether certain aspects of the rules governing auction applications, including the prohibitions on major changes and on certain communications as well as the rules governing bidding-related agreements including the current prohibition on joint bidding arrangements, should be waived to account for regulatory and business changes that have occurred since Auction 83 applications were filed in 2003;
- use of a simultaneous multiple-round auction format, consisting of sequential bidding rounds with a simultaneous stopping rule (with discretion by the Bureaus to exercise alternative stopping rules under certain circumstances);

⁷⁰ 5 U.S.C. § 603. The Regulatory Flexibility Act, *see* 5 U.S.C. §§ 601-12, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁷¹ 5 U.S.C. § 605(b).

⁷² 5 U.S.C. § 601(6).

⁷³ 5 U.S.C. § 601 (3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁷⁴ 15 U.S.C. § 632.

⁷⁵ 47 U.S.C. § 309(j)(3)(E)(i) (requiring the Commission to seek comment on auction procedures); *Part 1 Third Report and Order*, 13 FCC Rcd at 447-49, paras. 123-25 (directing Wireless Telecommunications Bureau to seek comment on specific mechanisms related to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension or cancellation); *Broadcast First Report and Order*, 13 FCC Rcd at 15967-68, paras. 127-28 (delegating authority to the Bureaus to seek comment and establish an appropriate auction design methodology prior to the start of each broadcast auction).

- a specific minimum opening bid amount for each construction permit proposed to be offered in Auction 83;
- a specific upfront payment amount for each construction permit;
- establishment of a bidder's initial bidding eligibility in bidding units based on that bidder's upfront payment through assignment of a specific number of bidding units for each construction permit;
- use of an activity rule that would require bidders to bid actively during the auction rather than waiting until late in the auction before participating;
- a single stage auction in which a bidder is required to be active on 100 percent of its bidding eligibility in each round of the auction;
- provision of three activity rule waivers for each bidder to allow it to preserve eligibility during the course of the auction;
- use of minimum acceptable bid amounts and additional acceptable amounts, along with a proposed methodology for calculating such amounts, with the Bureaus retaining discretion to change their methodology if circumstances dictate;
- a procedure for breaking ties if identical high bid amounts are submitted on a permit in a given round;
- bid removal procedures;
- whether to permit bid withdrawals;
- establishment of an interim bid withdrawal percentage of 20 percent of the withdrawn bid in the event the Bureaus allow bid withdrawals in Auction 83; and
- establishment of an additional default payment of 20 percent under section § 1.2104(g)(2) of the rules in the event that a winning bidder defaults or is disqualified after the auction.

57. The specific procedures and minimum opening bids on which comment is sought in this Public Notice will affect all applicants participating in Auction 83. Any revisions to applications procedures for pending Auction 83 applications would affect only those entities that are commonly controlled, or that underwent a major change of ownership or control after the short-form application deadline. Auction 83 is a "closed" auction, and only the 57 separate entities listed in Attachment A to this Public Notice may become qualified to bid. U.S. Census data for 2012 show that 2,849 radio station firms operated during that year.⁷⁶ Because the proposed procedures would affect a maximum of 57 radio station firms, or approximately two percent of the total, some of which are not small entities, we find that no substantial number of small entities would be affected by these procedures or minimum opening bid amounts. Therefore, we certify that the proposed procedures and minimum opening bids will not have a significant economic impact on a substantial number of small entities.

58. The Commission will send a copy of this Public Notice, including a copy of this Initial Flexibility Certification, to the Chief of Counsel for Advocacy of the SBA.⁷⁷ This initial certification will also be published in the Federal Register.⁷⁸

⁷⁶ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Notice of Proposed Rule Making, 32 FCC Rcd 4526, 4565 n.70 (2017).

⁷⁷ See U.S.C. § 605(b).

⁷⁸ See *id.*

A. Deadlines and Filing Procedures

59. Pursuant to sections 1.415 and 1.419 of the Commission's rules,⁷⁹ interested parties may file comments or reply comments on or before the dates indicated on the first page of this document in AU Docket No. 17-351. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.⁸⁰

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS at <http://apps.fcc.gov/ecfs>.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the captions of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

60. Filings in response to this Public Notice may be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. Eastern Time (ET). All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- *Commercial* overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

61. *Auction 83 E-mail Box:* The Bureaus also request that a copy of all comments and reply comments be submitted electronically to the following address: auction83@fcc.gov.

62. *People with Disabilities:* To request materials in accessible formats (braille, large print, electronic files, audio format) for people with disabilities, send an e-mail to fcc504@fcc.gov or call the Consumer and Government Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

63. This proceeding has been designated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.⁸¹ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine Period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to the Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations

⁷⁹ 47 CFR §§ 1.415, 1.419

⁸⁰ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

⁸¹ 47 CFR §§ 1.1200(a), 1.1206.

and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

B. Contact Information

64. For further information concerning this proceeding, contact the offices listed below:

Audio Division, Media Bureau

FM Translator service rule questions: James Bradshaw, Lisa Scanlan, or Tom Nessinger at (202) 418-2700

Auctions and Spectrum Access Division, Wireless Telecommunications Bureau

Auction legal questions: Lynne Milne (202) 418-0660
General auction questions: Auctions Hotline at (717) 338-2868

Office of Communications Business Opportunities

For questions concerning small business inquiries: (202) 418-0990

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